

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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EchoStar Corporation)	IBFS File No. SAT-LOA-20090528-00060
)	
)	Call Sign: S2791
Application to Operate a C-Band Geostationary)	
Satellite Orbit Satellite in the Fixed-Satellite)	
Service at the 84.9° W.L. orbital location)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: July 29, 2010

Released: July 29, 2010

By the Chief, International Bureau:

I. INTRODUCTION

1. By this Order, and pursuant to Section 25.159(d) of the Commission's rules, we dismiss EchoStar Corporation's (EchoStar's) application to construct, launch, and operate a C-band satellite at the 84.9° W.L. orbital location.¹ Applicants that have an established pattern of missing satellite implementation milestones as defined by Section 25.159(d) are prohibited by that rule from filing applications for new satellites until they rebut the presumption that they acquired one or more of their licenses for speculative purposes. In an almost three-year period, from December 2006 through September 2009, EchoStar did not implement five of its licensed satellites. Further, EchoStar currently has five authorized but unbuilt satellites. Under these circumstances, EchoStar cannot file additional applications until it rebuts the presumption that it had engaged in speculative activity. Because EchoStar has not rebutted this presumption, it is prohibited from filing additional applications for new satellites at this time. In addition, we deny EchoStar's request for a waiver of Section 25.159(d). EchoStar has not persuaded us that, given its failure to implement almost a half-dozen licensed satellites, we should allow it to hold additional orbital resources to the exclusion of others. Accordingly, we dismiss EchoStar's application. EchoStar may file a new application when it rebuts the presumption in Section 25.159(d) or when it no longer has two or more pending satellite applications or two or more licensed and unbuilt satellites, as set forth in Section 25.159(d).

II. BACKGROUND

2. Section 25.159(d) of the Commission's rules provides that if a space station licensee misses three implementation milestones for licensed satellites within a three-year period, there is a presumption that the licensee obtained one or more of the licenses for speculative purposes.² The rule

¹ 47 C.F.R. § 25.159(d).

² 47 C.F.R. § 25.159(d). Amendment of the Commission's Space Station Licensing Rules and Policies, *First Report and Order and Further Notice of Proposed Rulemaking in IB Docket No. 02-34, and First Report and* (continued....)

further states that “[u]nless the licensee rebuts this presumption, it will not be permitted to file another [application] in any frequency band if it has two or more satellite applications pending, or two licensed-but-unbuilt satellite systems of any kind.”³ This limit remains in effect until the licensee provides adequate information to demonstrate that it is “very likely to construct its licensed facilities” if it were allowed to file more applications.⁴

3. On May 23, 2008, EchoStar filed an application to construct, launch, and operate a geostationary-satellite orbit (GSO) satellite that would provide Fixed-Satellite Service (FSS) using C-band frequencies at the 84.9° W.L. orbital location.⁵ At the time it filed this application, EchoStar had missed three space station milestones within a three-year period.⁶ Further, at that time, EchoStar had five pending applications for satellites in the Broadcasting-Satellite Service (BSS) and two authorized but unbuilt FSS satellites.⁷ Consequently, Section 25.159(d) prohibited EchoStar from filing additional applications until it rebutted the presumption that it acquired one or more licenses for speculative purposes. In its filing, EchoStar did not rebut the presumption, request a waiver, or even acknowledge the rule. Accordingly, the International Bureau’s Satellite Division returned the application as

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Order in IB Docket No. 02-54, FCC 03-102, 18 FCC Rcd 10760 (2003) (*Space Station Licensing Reform Order*). Section 25.159(d) does not apply to licenses or applications in the Direct Broadcast Satellite service. *Space Station Licensing Reform Order*, 18 FCC Rcd at 10760, n. 4. It does apply to 17/24 GHz BSS applications and licenses. Establishment of Policies and Service Rules for the Broadcasting-Satellite Service at the 17.3-17.7 GHz Frequency Band and at the 17.7-17.8 GHz Band Internationally, and at the 24.75-25.25 GHz Frequency Band for Fixed Satellite Services Providing Feeder Links to the Broadcasting Satellite Service and for the Satellite Services Operating Bi-directionally in the 17.3-17.8 GHz Frequency Band, *Report and Order and Further Notice of Proposed Rulemaking*, FCC 07-76, 22 FCC Rcd 8842, 8849 (2007).

³ 47 C.F.R. § 25.159(d).

⁴ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10836.

⁵ EchoStar Corporation, IBFS File No. SAT-LOA-20080523-00112 (Call Sign: S2752).

⁶ These milestones relate to one Ka-band and two Ku-band satellites *See* Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Pantelis Michalopoulos, Counsel for EchoStar Satellite Operating Corporation (December 8, 2006) (surrendering EchoStar’s authorization for a Ka-band satellite at 117° W.L.) and Letter to Marlene H. Dortch, Secretary, Federal Communications Commission, from Pantelis Michalopolus, Counsel for EchoStar Satellite Operating Corporation (October 1, 2007) (surrendering EchoStar’s authorizations for a Ku-band satellite at 109° W.L. and at 121° W.L.).

⁷ *See* SAT-MOD-20070323-00055 (authorization for FSS space station at 112.85° W.L., Call Sign S2636), and SAT-MOD-20050308-00059 (authorization for Ka-band space station at 97° W.L., Call Sign S2499). EchoStar has since surrendered these authorizations. *See* Letters to Marlene H. Dortch, Secretary FCC from Pantelis Michalopoulos, Counsel for EchoStar Corporation, dated Sept. 2, 2009 and March 9, 2009. EchoStar requests that its surrender of 113° W.L. not be treated as a missed milestone. *See* Sept. 2 Letter. We need not resolve that issue here. Regardless of how we treat this surrender, the other missed milestones and number of authorized but unbuilt satellites are sufficient to trigger Section 25.159(d). *See also* then-pending BSS applications: File Nos. SAT-LOA-20020328-00050, SAT-AMD-20080114-00018, and SAT-AMD-20080213-00044 (for Call Sign S2440); SAT-LOA-20020328-00051 and SAT-AMD-20080114-00019 (for Call Sign S2441); SAT-LOA-20020328-00052, SAT-AMD-20080114-00020, and SAT-AMD-20080213-00043 (for Call Sign S2442); SAT-LOA-20070105-00001 and SAT-AMD-20080114-00021 (for Call Sign S2723); SAT-LOA-20070105-00003, SAT-AMD-20080114-00022, and SAT-AMD-20080213-00045 (for Call Sign S2725). These five applications have been granted.

unacceptable for filing, without prejudice to re-filing.⁸

4. On May 28, 2009, EchoStar re-filed its application to operate a GSO FSS space station using C-band frequencies at the 84.9° W.L. orbital location.⁹ In this application, EchoStar states that the presumption in Section 25.159(d) should not apply because it has not missed any milestones. Rather, EchoStar states that the missed milestones relate to authorizations that had been held by EchoStar Satellite Operating L.L.C., a subsidiary of DISH Network, which is a “separate and distinct company with overlapping but different ownership” – and not by EchoStar. EchoStar states it acquired certain licenses and satellite assets from DISH Network, and the acquired licenses did not include the licenses DISH had already surrendered.¹⁰ EchoStar also states that neither it nor DISH Network missed any milestones within the meaning of the rule. Instead, EchoStar asserts that DISH Network surrendered the three authorizations *before* the milestone dates, and therefore did not miss any milestones.¹¹ EchoStar further states that the licenses were surrendered due to legitimate justifications.

5. In addition, EchoStar asserts that, in the event the Commission applies Section 25.159(d), it can rebut the presumption that it acquired one or more licenses for speculative purposes. EchoStar states it has not engaged in speculation or bad faith conduct.¹² EchoStar argues that, to the contrary, it is an industry leader – with six operational satellites and recent efforts to bring competition to the FSS market.¹³ In addition, EchoStar claims that it and DISH Network have prioritized their satellite and spectrum resources, and the surrender of discrete authorizations allowed the company to focus efforts and expedite the construction of satellites at other locations. Therefore, EchoStar maintains that it is very likely to construct its licensed satellites if allowed to file more applications.¹⁴

6. Alternatively, EchoStar contends that to the extent Section 25.159(d) is deemed applicable, there is good cause for a waiver. First, EchoStar maintains that none of its actions implicate the purposes of the rule – to deter speculation, bad faith, and warehousing. EchoStar contends that it was not warehousing spectrum because other vacant Ka-band and extended Ku-band orbital locations are available. Second, EchoStar claims that its revised business plan allows it to expand its FSS business at targeted orbital locations, including the 84.9° W.L. orbital location.¹⁵ EchoStar states that waiving the

⁸ Letter to Pantelis Michalopoulos, Counsel for EchoStar Corporation, from Robert G. Nelson, Chief, Satellite Division, DA 09-1149 (May 27, 2009) (*May 27 Letter*).

⁹ EchoStar Corporation, IBFS File No. SAT-LOA-20090528-00060. (*EchoStar Application*). This application was placed on Public Notice. See Public Notice, Policy Branch Information, Report No. SAT-00626 (Aug. 21, 2009). No comments were received in response to the Notice.

¹⁰ *EchoStar Application*, Narrative at 6.

¹¹ *Id.*

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ *Id.* at 8.

¹⁵ *Id.* at 9.

rule will therefore facilitate competition to the benefit of U.S. consumers.¹⁶

III. DISCUSSION

A. Applicability of Section 25.159(d)

7. EchoStar argues that it did not miss three milestones in a three-year period. Rather, it states that EchoStar Satellite Operating L.L.C. -- not EchoStar Corporation -- held the three authorizations that were surrendered. EchoStar states that, in any event, EchoStar Satellite Operating L.L.C. surrendered the licenses before the milestone dates, and therefore did not miss milestones. Consequently, EchoStar concludes that Section 25.159(d) is not applicable here. We disagree.

8. In 2003, the Commission adopted a first-come, first-served licensing procedure for most GSO satellites.¹⁷ To ensure that the new procedure did not encourage speculative applications, the Commission also adopted a package of safeguards to ensure that licensees are committed and able to proceed with system implementation in a timely manner. The safeguards include a limit on the number of applications and authorized but unbuilt satellites that an entity may have at any one time.¹⁸ Section 25.159(d) reduces this limit for entities that have established a pattern of missing milestones.¹⁹ At the time it adopted these limits, the Commission also adopted an attribution rule.²⁰ The Commission stated that without an attribution rule, applicants could “evade the limit simply through corporate restructuring.”²¹ Section 25.159(c) states that the Commission will consider “attributable” interests in counting the number of applications and licensed but unbuilt satellites.²² The rule provides that an applicant has an attributable interest in another entity if it holds more than 33 percent interest, or has a controlling interest or is a subsidiary of a party holding a controlling interest in the entity.²³

9. EchoStar claims that Section 25.159(d) does not apply because EchoStar Satellite Operating L.L.C., a subsidiary of DISH Network, is the entity that missed the milestones. It further states that a “distinct company” -- EchoStar Corporation -- applied for the license here. We note that Charles W. Ergen holds an equity interest greater than 33 percent in both DISH Network and EchoStar Corporation, as well as a controlling interest in both companies and their subsidiaries.²⁴ Therefore,

¹⁶ *Id.*

¹⁷ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10792.

¹⁸ 47 C.F.R. § 25.159(c).

¹⁹ 47 C.F.R. § 25.159(d).

²⁰ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10849.

²¹ *Id.*

²² 47 C.F.R. § 25.159(c).

²³ *Id.*

²⁴ In its application, EchoStar represents that Charles W. Ergen holds an equity interest of 54 percent, and an approximate voting interest of 87.3 percent in EchoStar Corporation. See IBFS File No. SAT-LOA-20090528-00060. Another application filed with the Commission shows that Charles Ergen holds an equity interest of 42.3 (continued....)

EchoStar Corporation has an attributable interest in the licensee that missed the milestones.

10. Thus, EchoStar argues, in essence, that while the rule considers attributable interests in determining the number of applications and unbuilt satellites, attributable interests should not be considered in determining whether a licensee has a pattern of missing milestones. This interpretation undercuts the rule's purpose. Such a result would allow an entity to restructure itself, apply for and receive new licenses in the name of the restructured company, and yet never construct or launch any of its licensed satellites. This could allow a continually restructured entity to hold scarce orbital resources to the exclusion of others indefinitely. This is precisely the sort of speculation Section 25.159 was designed to prevent.

11. In addition, we find no merit to EchoStar's assertion that Section 25.159(d) does not apply because EchoStar did not miss milestones, but rather surrendered its licenses *before* a milestone date. When it adopted Section 25.159(d), the Commission stated it "will presume that a licensee that creates a pattern of obtaining licenses and then surrendering them before a milestone deadline is also engaging in speculative activity, and will impose the stricter limits unless and until the licensee rebuts this presumption."²⁵

12. Accordingly, we will presume, pursuant to Section 25.159(d), that EchoStar acquired one or more licenses for speculative purposes. At the time it filed this application for a C-band satellite at 84.9° W.L. in May 2009, EchoStar had five other pending applications for BSS satellites and one authorized but unbuilt FSS satellite.²⁶ Consequently, Section 25.159(d) does not permit EchoStar to file additional applications for new satellites, such as the application for a C-band satellite at issue here, until it rebuts this presumption.

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percent and an approximate voting interest of 58 percent in EchoStar Satellite Operating, LLC, a wholly owned subsidiary of DISH Network. See IBFS File No. SAT-LOA-20090518-00053. Further, EchoStar represented that spinning off the DISH Network from EchoStar Corporation was a *pro forma* transaction, because "it would not result in any change in ownership or control of the surviving entity or new entity.... Charles Ergen will be the CEO as well as the controlling shareholder of both entities." See IBFS File No. SAT-ASG-20071108-00151 (consummated Jan. 1, 2008). SEC filings for both DISH Network and EchoStar Corporation confirm that Mr. Ergen holds equity interests in excess of 33 percent, as well as a controlling interest, in both companies. See, e.g., Dish Network Corporation, SEC 10-K filing for the fiscal year ended December 31, 2009, available at <http://www.sec.gov/Archives/edgar/data/1001082/000095012310018671/d70537e10vk.htm>. Mr. Ergen also has established certain trusts for the benefit of his family that beneficially own approximately 10.0% of total equity securities and 8.5% of the total voting power of DISH Network Corporation. DISH Operating L.L.C., the successor of EchoStar Satellite Operating L.L.C., is a 100% directly owned subsidiary of DISH Network Corporation. *Id.* at Exhibit 21. See also EchoStar Corporation, SEC 10-K filing, March 17, 2010 ("a substantial majority of the voting power of both EchoStar Corporation and DISH Network is owned beneficially by Charles W. Ergen"); and EchoStar Corporation, Form 8-K (October 8, 2009) ("DISH Network was EchoStar [Corporation's] former parent corporation and is an affiliate of EchoStar by virtue of their common controlling shareholder, Charles Ergen. In addition, certain officers and directors of DISH Network, including Charles Ergen, are also officers and directors of EchoStar.")

²⁵ *Space Station Licensing Reform Order*, 18 FCC Rcd at 10836, n.463.

²⁶ EchoStar's five pending BSS applications have since been granted. EchoStar has not launched any of its BSS satellites. Thus, the presumption continues to apply. We note that shortly before filing the May 2009 application, EchoStar surrendered its Ka-band authorization for the 97° W.L. orbital location, thus leaving it with one authorized but unbuilt FSS authorization when the application was filed.

B. Rebutting Section 25.159(d)'s Presumption

13. EchoStar contends that its status as an industry leader is sufficient to rebut the presumption that it acquired one or more licenses for speculative purposes.²⁷ EchoStar states that its six operating satellites and its recent authorizations for additional satellites provide evidence that it is not a speculator.²⁸

14. EchoStar's overall status in the industry does not, in itself, provide evidence that EchoStar did not engage in speculative activity in applying for certain satellite licenses. Nor does it demonstrate that EchoStar is very likely to construct its licensed facilities. The number of in-orbit satellites EchoStar is operating does not alter the fact that EchoStar has surrendered licenses for *five* satellites in a 33-month period.²⁹ Moreover, EchoStar acknowledges that its intent to move forward on certain currently authorized satellites may again change depending on its business plans.³⁰ Applying for licenses for multiple satellites, and later deciding to build some, but abandon others, is exactly the type of speculation the rule was designed to prevent. Other than citing its status as an industry leader, EchoStar has provided no other evidence to rebut the presumption that it acquired one or more licenses for speculative purposes, or that it is likely to construct its licensed facilities if it is allowed to file additional applications. Thus, we find that Section 25.159(d) prohibits EchoStar from filing additional applications at this time.

C. Waiver of Section 25.159(d)

15. A waiver may be granted if the petitioner demonstrates good cause for such action.³¹ Good cause may be demonstrated "where particular facts would make strict compliance inconsistent with the public interest."³² To make this public interest determination, the waiver cannot undermine the purposes of the rule, and there must be a stronger public interest benefit in granting the waiver than in applying the rule.³³

²⁷ *EchoStar Application*, Narrative at 6.

²⁸ *Id.* at 7.

²⁹ Since the bond requirement became effective in 2003, only one other company operating an in-orbit space station has surrendered an authorization after posting the bond. In that case, the company surrendered only one authorization. See Letter to Marlene H. Dortch, Secretary FCC, from Jennifer Manner, Vice President, Regulatory Affairs, MSV International LLC. (June 12, 2006).

³⁰ *EchoStar Application*, Narrative at 8.

³¹ 47 C.F.R. § 1.3. See also *ICO Global Communications (Holdings) Limited v. FCC*, 428 F.3d 264 (D.C. Cir. 2005); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

³² *Northeast Cellular*, 89 F.2d at 1166; *ICO Global Communications*, 428 F.3d at 269 (quoting *Northeast Cellular*); see also *WAIT Radio*, 418 F.2d at 1157-59.

³³ See, e.g., *WAIT Radio*, 418 F.2d at 1157 (stating that even though the overall objectives of a general rule have been adjudged to be in the public interest, it is possible that application of the rule to a specific case may not serve the public interest if an applicant's proposal does not undermine the public interest policy served by the rule); (continued....)

16. EchoStar asserts that a waiver of Section 25.159(d) is warranted based on its efforts to bring competition to the fixed-satellite service market, and that its proposed satellite at the 84.9° W.L. orbital location is central to these efforts. EchoStar further states that it has not engaged in speculative or bad faith conduct. It asserts, rather, that it surrendered other satellite authorizations to put it in a better position to implement its proposed satellite at 84.9° W.L. and at other locations where the company has decided to focus its efforts.³⁴ EchoStar also states that it has not engaged in warehousing because other orbital locations in the same frequency bands are available for assignment to other applicants.

17. Granting EchoStar a waiver of Section 25.159(d) for these reasons would undermine the rule's purpose – to prevent applicants from filing speculative applications and holding scarce orbital resources to the exclusion of others while deciding whether to proceed with their licensed satellites. Section 25.159(d) is intended to prevent an entity with a pattern of surrendering licenses from applying for additional licenses until it demonstrates it is likely to implement its authorized satellites. The number of orbital locations that are available to other applicants is irrelevant to a particular licensee's commitment and ability to proceed with construction and launch of its licensed satellites.³⁵

18. Further, the number of licenses it surrendered supports a presumption that it acquired some or all of these licenses for speculative purposes and indicates that it was biding its time to determine which orbital slots would best serve its purposes. In any case, the Commission has stated that, regardless of intent, the actions of a licensee who obtains a license and surrenders it later has the same effect as the actions of a licensee who warehouses scarce orbit and spectrum resources.³⁶

19. Last, EchoStar's refocused business plans surrounding the nominal 85° W.L. and other orbital locations do not provide good cause for a waiver. Even assuming that EchoStar is in a position to proceed with a satellite at 84.9° W.L., its assertions confirm that it was not in a position to implement *all* of its licensed satellites, and that only by abandoning several of them is it possible to proceed at 84.9° W.L. Further, EchoStar has provided no evidence that it is very likely to construct and launch the five 17/24 GHz satellites for which it holds licenses, and no evidence that it is likely to construct and launch its proposed C-band satellite at 84.9° W.L. We recognize that, in other proceedings, EchoStar has supplied documentation asserting that it has met the required milestones for its authorized 17/24 GHz satellites to date.³⁷ For entities with a pattern of surrendering licenses, however, meeting one milestone does not provide conclusive evidence that the licensee is likely to complete construction of and launch a

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Northeast Cellular, 89 F.2d at 1166 (stating that in granting a waiver, an agency must explain why deviation from the general rule better serves the public interest than would strict adherence to the rule).

³⁴ *EchoStar Application*, Narrative at 7.

³⁵ See *AtContact Communications LLC*, *Order*, FCC 10-100 (rel. June 3, 2010) (noting that orbital locations have unique characteristics and applicants apply for locations that have optimal characteristics for the intended purpose), ¶ 54.

³⁶ Amendment of the Commission's Space Station Licensing Rules and Policies, *First Order on Reconsideration and Fifth Report and Order*, 19 FCC Rcd 12637, 12652 (2004).

³⁷ EchoStar has provided contractual information as evidence that it met the first milestone for its five 17/24 GHz BSS authorizations. See SAT-LOA-20070105-00001, Call Sign S2723; SAT-LOA-20070105-00003, Call Sign S2725; SAT-LOA-20020328-00050, Call Sign S2440; SAT-LOA-20020328-00052, Call Sign S2442; and SAT-LOA-20020328-00051, Call Sign S2441. The Bureau staff is reviewing these contracts.

satellite. Indeed, EchoStar met at least the first two milestones in each of the five licenses it surrendered. EchoStar has provided no detailed business plans or other documentation that convinces us that it is very likely to construct and launch all of its five remaining licensed satellites, let alone a sixth satellite. Instead, EchoStar indicates that it may not move forward with certain satellites depending on its business plans.³⁸ Allowing a licensee to continue to file applications for additional satellites, with the knowledge that it may well receive a waiver of Section 25.159(d) regardless of the number of licenses it has surrendered and without providing persuasive evidence that it is likely to construct and launch its licensed satellites, would eviscerate the rule. Accordingly, we deny EchoStar's request for a waiver.

IV. CONCLUSION AND ORDERING CLAUSE

20. Based on the foregoing, we find that EchoStar's failure to meet three milestones in a three year period, together with the number of pending applications for new satellites and the number of authorized but unbuilt satellites, preclude it from filing additional applications under Section 25.159(d), unless it can rebut the presumption that it acquired one or more licenses for speculative purposes. EchoStar did not rebut this presumption. We also find that EchoStar has failed to justify a waiver of the rule.

21. Accordingly, IT IS ORDERED, that the EchoStar Corporation's Application, File No. SAT-LOA-20090528-00060 is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Mindel De La Torre
Chief, International Bureau

³⁸ *EchoStar Application*, Narrative at 8.